

DEC 13 2018

PETER A. MOORE, JR., CLERK
US DISTRICT COURT, EDNC
JAB DEP CLKMOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT
SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court		District: Eastern District of North Carolina	
Name (under which you were convicted): Mark Anthony Daye		Docket or Case No.: 5:16-cr-00111-D-2	
Place of Confinement: FCI LORETTO		Prisoner No: 73371-112	
UNITED STATES OF AMERICA		Mark Anthony Daye (include name under which you were convicted)	

MOTION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:
United States District Court For The Eastern District of North Carolina

(b) Criminal docket or case number (if you know): **5:16-cr-00111-D-2**
2. (a) Date of the judgment of conviction (if you know) **12/13/2017**
3. Length of sentence: **262 months for count 1 and 240 on count 2**
4. Nature of crime (all counts): **Conspiracy to knowingly and intentionally distribute and possess with the intent to distribute Five (5) Kilo grams or more of cocaine, and Conspiracy to launder monetary instruments.**
5. (a) What was your plea? (Check one)
(1) Not guilty ☐ (2) Guilty ☒ (3) Nolo contendere (no contest) ☐

(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to?
6. If you went to trial, what kind of trial did you have? (Check one) Jury ☐ Judge only ☐
7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes ☐ No ☒
8. Did you appeal from the judgment of conviction? Yes ☐ No ☒

9. If you did appeal, answer the following? **N/A**
- (a) Name of court:
 - (b) Docket or case number (if you know):
 - (c) Result:
 - (d) Date of result (if you know):
 - (e) Citation to the case: (if you know)
 - (f) Grounds raised:
 - (g) Did you file a petition on Certiorari in the United State Supreme Court? Yes ☐ No ☒
10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications concerning this judgment or conviction in any court?
Yes ☐ No ☒
11. If your answer to Question 10 was "Yes," give the following information:
- (a)
 - (1) Name of court:
 - (2) Docket and case number
 - (3) Date of filing:
 - (4) Nature of proceeding
 - (5) Grounds raised:
 - (6) Did you receive a hearing where evidence was given on your, petition, or application?
Yes ☐ No ☐
 - (5) Result:
 - (6) Date of result (if you know):
 - (b) If you filed any second motion, petition, or application, give the same information:
 - (1) Name of court: **N/A**
 - (2) Docket and case number
 - (3) Date of filing :
 - (4) Nature of proceeding
 - (5) Grounds raised:
 - (6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes ☐ No ☐
 - (7) Result: **N/A**

(8) Date of result (if you know): N/A

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ☐ No ☐

(2) Second petition: Yes ☐ No ☐

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not:

12. State every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Summarize briefly the facts supporting each ground.

GROUND ONE: WHETHER PETITIONER SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS DENIED WHEN COUNSEL FAILED TO GIVE REASONABLE ADVICE DURING PLEA NEGOTIATIONS, LEADING TO THE ENTERING OF AN UNKNOWNING, INVOLUNTARY AND INVALID PLEA

Petitioner submits that he was denied his Sixth Amendment right to effective assistance of counsel when counsel failed to give reasonable advice during plea negotiations, leading to the entering of an unknowing, involuntary, and invalid plea.

(a) Supporting FACTS (state briefly without citing cases or law):

Trial counsel failed to give proper or reasonable advice during the plea negotiation process, in relationship to the guilty plea entered; the sentence to be expected; the application of the sentencing guidelines and sentencing alternatives; the waiver of rights and the forfeiture provisions.

Petitioner submits that had he received proper or reasonable advice, he never would have entered the plea, but, instead proceeded to trial and maintained his innocence.

Petitioner seeks to supplement this argument after he receives a copy of this case file and PSR.

(b) Direct Appeal of Ground One:

(1) If you appealed from the judgment of conviction, did you raise the issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: **Claim relates to ineffective assistance of counsel.**

(c) Post-Conviction Proceedings:

(1) Did you raise this issue on any post-conviction motion or petition, or application?

Yes ☐ No ☒

(2) Type of motion or petition: _____

Name and location of court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of court's decision: _____

Results (attach a copy if the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application? Yes ☐ No ☐

(5) If your answer to Question (c) (4) is "Yes", did you raise the issue in the appeal? ☐ Yes No ☐

GRUOND TWO: WHETHER PETITIONER SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS DENIED WHEN COUNSEL FAILED TO OBJECT TO THE PRESENTENC INVESTIGATIONS USE OF A NON-QUALIFYING PRIOR CONVICTION FOR ENHANCEMENT PURPOSES

(a) Supporting FACTS (state briefly without citing cases or law):

Trial counsel's failure to object to the Presentence Investigation Report's use of a non-qualifying prior conviction for enhancement purposes denied Petitioner his Sixth Amendment right to effective assistance of counsel. Had counsel objected to the PSR's use of the non-qualifying prior conviction, Petitioner's sentence would have been less severe.

Petitioner seeks to supplement this argument after he receives a copy of his case file and PSR.

(b) Direct Appeal of Ground Two:

(2) If you appealed from the judgment of conviction, did you raise the issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: **Claim relates to ineffective assistance of counsel.**

(c) Post-Conviction Proceedings:

(3) Did you raise this issue on any post-conviction motion or petition, or application?

Yes ☐ No ☒

(4) Type of motion or petition: _____

Name and location of court where the motion or petition was filed: _____

Docket or case number (if you know): _____
Date of court's decision: _____
Results (attach a copy if the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application? Yes ☐ No ☐

(5) If your answer to Question (c) (4) is "Yes", did you raise the issue in the appeal? Yes ☐ No ☐

(6) If your answer your answer to question (c) (4) is "Yes", state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know): _____

Date of the court's decision: _____

Results (attach a copy of the court's opinion or order, if available): _____

(1) If you answer to Question (c)(4) or question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND THREE: WHETHER PETITIONER WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, BASED ON COUNSEL'S FAILURE TO PERFECT AN APPEAL, AFTER PETITIONER SPECIFICALLY REQUESTED THAT COUNSEL FILE AN APPEAL CHALLENGING THE GUIDELINES, STATUTORY, AND FORFEITURE ALLEGATIONS

(a) Supporting FACTS (state briefly without citing cases or law):

On December 13, 1997, immediately after the court pronounced sentence, Petitioner instructed counsel to file an appeal and counsel failed to do as instructed, thereby Petitioner's sentence is subject to collateral attack.

Petitioner seeks to supplement this argument after he received a copy of his case file and PSR.

(d) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise the issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: **Claim relates to ineffective assistance of counsel.**

(c) Post-Conviction Proceedings:

(1) Did you raise this issue on any post-conviction motion or petition, or application?

Yes ☐ No ☒

(2) Type of motion or petition: _____

Name and location of court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of court's decision: _____

Results (attach a copy if the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application? Yes ☐ No ☐

(5) If your answer to Question (c) (4) is "Yes", did you raise the issue in the appeal? Yes ☐ No ☐

(6) If your answer your answer to question (c) (4) is "Yes", state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know): _____

Date of the court's decision: _____

Results (attach a copy of the court's opinion or order, if available): _____

(7) If you answer to Question (c)(4) or question (c)(5) is "No," explain why you did not appeal or raise this issue:

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

Claims 1 through 3 as they relate to claim properly presented in the district court, as they pertain to matters off record, and instances of ineffective assistance of trial counsel.

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the judgment you are challenging? Yes ☐ No ☒

- If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.
15. Give the name and address, if known, each attorney who represented you in the following stages of the judgment you are challenging:
- (a) At preliminary hearing: **Jessie Jeffers**
Law office of Jessie A. Jeffers
P.O. Box 7610
Raleigh, NC 27602
- (b) At arraignment and plea: **Nardine Mary Guirguis**
Guirguis Law, PA
434 Fayetteville St., Suite 2140
Raleigh, NC 27601
- (c) At trial:
- (d) At sentencing: **SAME**
- (e) On appeal:
- (f) In any post-conviction proceeding: **N/A**
- (g) On appeal from any ruling against you in a post-conviction proceeding: **N/A**
16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☒ No ☐
17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☒
- (a) If so, give name and location of court that imposed the other sentence you will serve in the future: **N/A**
- (b) Give date and length of the above sentence: **N/A**
- (c) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ☐ No ☐

18. **TIMELINESS OF MOTION:** If your judgment of final conviction became final over one year ago, you must explain the one year statute of limitations as contained in 28 U.S.C. 2255 does not bar you motion . *

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

- (1) The date on which the judgment of conviction became final;
- (2) The date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
- (3) The data on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) The date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Therefore, movant asks that the Court grant the following relief: Vacation of plea, and sentence.

or any other relief to which movant may be entitled.

N/A

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on 12/07/2018.
(Month, date, year)

Executed (signed) on 12/07/18 (date).

Mark A. Daye

Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.